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NO. 83-1610

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

H.D. GROSS and HELEN GROSS,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDICES TO JURISDICTIONAL STATEMENT

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

H. D. GROSS AND
HELEN R. GROSS,

Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant.

NO. CV 82-2236-R

JUDGMENT

FILED December 12, 1982

This action came on for hearing, the Honorable Manuel L. Real presiding, and the issues having been duly heard and a decision having been rendered,

IT IS ORDERED AND ADJUDGED:

1. That plaintiffs take nothing by their complaint and that plaintiffs'

complaint and action be dismissed with prejudice.

2. That the United States shall have its costs incurred in this action.

DATED: This 12th day of December, 1982.

MANUEL S. REAL

UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT

CENTRAL DISTRICT OF CALIFORNIA

H. D. GROSS AND
HELEN R. GROSS,

Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant.

NO. CV 82-2236-R

FINDINGS OF FACT AND CONCLUSIONS OF LAW

FILED December 12, 1982

This action came on for hearing before the Court, the Honorable Manuel L. Real, District Judge, presiding on December 20, 1982. The plaintiffs were represented by Peter Amschel, Esq. The defendant was represented by Stephen S. Trott, United States Attorney, Central

District of California, Charles H. Magnuson, Assistant United States Attorney, Chief, Tax Division, with an appearance by William J. James, Assistant United States Attorney. The issues having been duly tried and a decision having been rendered, the Court makes Findings of Fact and Conslusions of Law as follows:

FINDINGS OF FACT

1. This is an action seeking to recover federal income taxes paid by plaintiffs for the years 1976 and 1977. Plaintiffs' claims arise out of: 1) The disallowance of deductions claimed for expenses incurred by plaintiff-husband traveling to, and lodging and dining at, his principal place of business; 2) The disallowance of deductions claimed for

the expense of hiring a gardener at plaintiffs' residence, and 3) A deficiency assessed with respect to unreported income received by plaintiffs.

2. Plaintiffs maintained a family residence in Santa Monica, California, at all times relevant to this action. In or before 1965, Mr. Gross became involved in business dealings in the area of Hemet, California, where he established a constructions business. From the middle of 1972 through 1978, Mr. Gross spent the work week in the Hemet area as the sole proprietor of his business and returned to Santa Monica to spend weekends with his family. Plaintiffs claimed as business deductions expenses allegedly incurred by Mr. Gross for automobile travel between his residence in Santa Monica and the Hemet job

site as well as expenses for meals and lodging incurred during the week.

3. Deductions were also taken by the taxpayers on their 1976 and 1977 returns for expenses allegedly incurred in employing a gardener at their private residence in Santa Monica. Plaintiffs' sole contention with respect to this deduction is that employing a gardener allowed Mr. Gross more time to pursue his business and the production of income.

4. In addition to disallowing the above deductions, the Internal Revenue Service determined that plaintiffs failed to report taxable income in the amount of $35,689.00 in 1976 and $24,006.00 in 1977. Plaintiffs disagreed with these determinations but refused to answer any questions asked

about the additional amounts of income determined by the Internal Revenue Service.

5. On February 16, 1981, the Internal Revenue Service entered a deficiency assessment against the plaintiffs in the amount of $13,091.00 with respect to the year 1976, and $20,929.54 with respect to the year 1977. On March 23, 1981, plaintiffs paid $44,545.65 which was applied against the above assessments together with interest and penalties accrued thereon. Plaintiffs submitted an administrative claim for refund of this amount together with their payment. On June 1, 1981, plaintiffs paid an additional $581.13 which was applied to satisfy the balance of penalties and interest due. Plaintiffs did not file

an administrative claim for refund with respect to this amount.

6. Any Conclusion of Law deemed to be a Finding of Fact is hereby found to be a Fact.

CONCLUSIONS OF LAW

1. "An action to recover on a claim for refund is in the nature of an action for money had and received, and it is incumbent upon the claimant to show that the United States has money which belongs to him. Not only must the plaintiff show that the Commissioner was wrong, but he must go further and establish the essential facts from which a correct determination of his tax liability can be made. The burden is on the taxpayer to establish the exact amount to which he is entitled. To sustain the

burden upon him, the taxpayer must prove the legality and amount of any deductions claimed." Arkhola Sand & Gravel Co. v. United States, 190 F.Supp. 29, 36-37 (W.D. Ark. 1960); Lewis v. Reynolds, 284 U.S. 281 (1932); Missouri Pacific R.R. Co. v. United States, 338 F.2d 668, 671 (Ct.Cl. 1964); Larrabee v. United States, 37 F.R.D. 61 (C.D. Cal. 1965); First Nat. Bank of Miami v. United States, 235 F.Supp. 331, 337 (S.D. Fla. 1964).

2. Where a taxpayer resides in one city and has his principal place of business in another, his expenses of cummuting between his residence and his work are personal, and not deductible as business expenses. 26 U.S.C. § 262; Commissioner v. Flowers, 326 U.S. 465 (1946); Commissioner v. Stidger, 386

U.S. 287 (1967); Wills v. Commissioner, 411 F.2d 537, 541 (9th Cir. 1969). Mr. Gross established his construction business in the Hemet Valley area years before the periods here in issue. He derived substantially all of his income from his employment in the Hemet Valley area, and his choice to raise his family in Santa Monica was personal.

3. Unless specifically provided for in Chapter 1 of the Internal Revenue Code, no deduction is allowed for personal, living, or family expenses. 26 U.S.C. § 262. The expenses of maintaining a household are specifically included in this category. 26 C.F.R. § 1.262-1(b)(3). Even if some portion of one's home were deductible, the expenditures for lawn care and landscaping would not be. Rev. Rul. 62-180, 1962-2

C.B. 52, 53. Plaintiffs' attempt to deduct the costs of their gardener is unsupported by any legal authority.

4. Congress intended to tax, "all whatever source derived" unless specifically excluded by law. 26 U.S.C. § 61; Commissioner v. Glenshaw Glass Co., 348 U.S. 426 (1955). Where as here, a taxpayer fails or refuses to rebut the presumption of correctness which attaches to the assessment entered by the Internal Revenue Service, such assessment must be sustained. United States v. Molitor, 337 F.2d 917, 922-23 (9th Cir. 1964).

5. The Federal Income Tax Laws, Title 26 of the United States Code, do not violate Article 1, Section 9, Clause 4 of the Constitution. Sixteenth Amendment; Brushaber v. Union Pacific R.R.

Co., 240 U.S. 1 (1916); Kerr v. Commissioner, 326 F.2d 225 (9th Cir. 1964). The argument here advanced by plaintiffs, that the income tax is unconstitutional because it is direct and nonuniform, has been rejected as frivolous. Lonsdale v. Commissioner, 661 F.2d 71 (5th Cir. 1981).

6. The District Court lacks jurisdiction with respect to those payments made subsequent to the filing of plaintiffs' administrative claim for refund. 26 U.S.C. § 7422(a).

7. Plaintiffs shall take nothing by their Complaint and Judqment shall be entered on behalf of the defendant, United States of America.

8. Any Finding of Fact deemed to be a Conclusion of Law is hereby concluded as a matter of law.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: December 12, 1982

MANUEL S. REAL

UNITED STATES
DISTRICT JUDGE